Before the
United States Department of Transportation
Pipeline & Hazardous Materials Safety Administration

The State of North Dakota
Office of the Attorney General

The State of Montana
Office of the Attorney General

Part 107.203 Application for Preemption of
Washington State's Volatility Restrictions on Crude Oil Transported by Rail
Applicable to the Transportation of Certain Hazardous Materials
Rebuttal Comments – Docket No. PHMSA-2019-1049

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I. INTRODUCTION

The State of North Dakota Attorney General's Office together with the State of Montana Attorney General's Office submit this rebuttal to comments filed in opposition to North Dakota and Montana's application for a preemption determination (the "Preemption Petition") regarding Washington State's law regulating the volatility of crude oil transported by rail in Washington State for loading and unloading (the "Washington Law").[1]

Washington State has not refuted the fundamental fact that if a shipment of crude oil that is compliant with Federal law cannot be loaded or unloaded in Washington State, then Washington's requirements are by definition not substantively the same as the Federal requirements and impose an obstacle to compliance with the Hazardous Materials Transportation Act (HMTA). Instead the bulk of its comments are devoted to evasive maneuvers, including arguments that the petitioning States lack adequate standing to seek preemption (despite the statutory directive that States may seek preemption) and that the petitioning States lack adequate evidence to support their request (despite the regulatory commonplace that PHMSA can, and does, develop its own record to support its determinations).

The first section of these rebuttal comments explains why North Dakota and Montana have standing to file the Preemption petition. The next section addresses the evidentiary standard and burden of the petitioner in seeking a preemption determination; the third section rebuts comments suggesting that the Washington Law does not create an obstacle to compliance with the HMTA and addresses the significance of the Sandia Study to PHMSA's evaluation; and the fourth section rebuts the argument that the Washington Law is substantively the same as federal law with respect to the covered subjects specified in Section 5125(b) of the HMTA.

II. NORTH DAKOTA AND MONTANA HAVE ADEQUATELY DEMONSTRATED THEY ARE DIRECTLY AFFECTED BY THE WASHINGTON STATE LAW AND HAVE STANDING.

There is no doubt that North Dakota and Montana are "directly affected" by the Washington Law, as set forth in detail in the original Preemption Petition, and have the requisite standing to challenge the Washington Law. The comments filed by the Washington State Attorney General articulate an overly narrow concept of standing for preemption determinations;

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[1] *See* Washington State Engrossed Substitute Senate Bill 5579, "Crude Oil by Rail – Vapor Pressure" (signed into law May 9, 2019 and effective July 28, 2019), codified at 2019 Wash. Rev. Code Ann. § 90.56.0001 (West), http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Session%20Laws/Senate/5579-S.SL.pdf.

the Pipeline and Hazardous Materials Safety Administration (PHMSA) and its predecessor, the Research and Special Programs Administration (RSPA), have long-interpreted the "directly affected" requirement broadly. And as described below, the impacts on North Dakota and Montana's tax revenues are far from speculative, and, despite Washington's claims, a tax revenue impact can indeed be a "direct effect" sufficient to support standing. This is particularly true for "land grant" states like North Dakota and Montana, where the state itself is the landowner and entitled to the royalties from oil and gas extraction activities. North Dakota and Montana also have demonstrated the requisite direct effects by identifying the environmental and safety impacts that those States would experience as a result of the Washington Law.

A. PHMSA Interprets the "Directly Affected" Requirement Broadly and Does Not Limit Standing to Those Subject to Enforcement Action Under the Contested Law

The preemption provision of the HMTA states that

> a person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by the regulations prescribed by the Secretary, for a decision on whether the requirement is preempted [by the HMTA or the hazardous materials regulations (HMR)].[2]

To the extent that this statement provides a standing requirement, PHMSA and its predecessor RSPA have traditionally interpreted the requirement broadly.[3] In *Connecticut Statute and Regulation Governing Transportation of Radio Active Materials (IR-21)*, for example, RSPA emphasized its "broad construction of the 'person affected' test contained in § 107.203 of the HMR," the precursor to today's "directly affected" standard.[4] In articulating its broad interpretation, RSPA noted that the goal of the preemption determination process is to "alleviate expensive and time-consuming litigation of such issues" and "produce an inherently consistent body of interpretations."[5] Therefore, RSPA stated it would "apply a broad interpretation of the 'person affected' standard in this and future inconsistency proceedings."[6]

[2] 49 U.S.C. § 5125(d)(1).

[3] PD-32(R), *Maine Department of Environmental Protection Requirements of Transportation of Cathode Ray Tubes*, 74 Fed. Reg. 46,644, 46,648 (Sept. 10, 2009) ("[t]o the extent that 49 U.S.C. 5125(d)(1) contains a 'standing' requirement for applying for a preemption determination, PHMSA has interpreted that requirement broadly.").

[4] IR-21, *Connecticut Statute and Regulations Governing Transportation of Radioactive Materials*, 52 Fed. Reg. 37,072, 37,073 (Oct. 2, 1987).

[5] *Id.*

[6] *Id.*

After the HMTA was amended in 1990 to clarify the preemptive effects of the law and change the procedures related to preemption determinations,[7] the same construction of the standing requirements held true. In *Application by National Solid Waste Management Association for a Preemption Determination Concerning Illinois Environmental Protection Agency's Uniform Hazardous Waste Manifest (PD-2(R))*, for example, RSPA reconfirmed that "[i]n the past, [it had] liberally construed the threshold requirements for obtaining inconsistency rulings" and that it "interprets 'directly affected' person broadly because important preemption issues are raised under the HMTA, and all parties engaged in hazardous materials transportation or the regulation of that transportation will be served by RSPA's addressing preemption issues."[8] PHMSA subsequently adopted and reconfirmed the same broad construction in *Maine Department of Environmental Protection Requirements of Transportation of Cathode Ray Tubes (PD-32(R))*, and also acknowledged that the benefit of a liberal standing interpretation is that it provides resolution for all parties engaged in hazmat transportation.[9] Indeed, even when an applicant for a preemption determination purported to "withdraw" its application, PHMSA has continued the analysis, stating that it believes that the value in deciding whether a non-Federal requirement is inconsistent with (or preempted by) Federal hazardous materials transportation law "goes beyond the resolution of an individual controversy. At a time when hazardous materials transportation is receiving a great deal of public attention, the forum provides [PHMSA] an opportunity to express its views on the proper role of State and local vis-a-vis Federal regulatory activity in this area."[10] Washington State's narrow vision of the HMTA's standing requirement is thus contradicted by decades of PHMSA preemption determination precedent.

Washington State's comments suggest that only Washington State refineries would have standing to challenge the law because they are the only entities "directly affected" by it.[11] The

[7] *See* 56 Fed. Reg. 8,616, 8,617–18, "Amendments to the Hazardous Materials Program Procedures and Regulations" (Feb. 28, 1991). The 1990 amendments, among other things, eliminated the RSPA Director's authority to issue inconsistency ruling *sua sponte*, and replaced RSPA's authority to issue non-binding, advisory opinions (known as "inconsistency rulings") with a binding preemption determination.

[8] 58 Fed. Reg. 11,176, 11,181-82 (Feb. 23, 1993).

[9] 74 Fed. Reg. 46,644, 46,648 (Sept. 10, 2009) (internal citations omitted) (finding standing for trade association whose only members were other trade associations where only the "second-level" members were the individual companies affected by the state or local requirement at issue in the preemption petition).

[10] PD-25(R), *Missouri Prohibition against Recontainerization of Hazardous Waste at a Transfer Facility*, 66 Fed. Reg. 37,089, 37,090 (July 16, 2001).

[11] *See* Washington AG Comments at 2 and 7.

text of the HMTA preemption provision belies that conclusion. As noted above, the provision states that a person, "*including a State*," directly affected by a requirement imposed by another State may apply for a preemption determination regarding the requirement.[12] The law thus explicitly contemplates that one state may be sufficiently "directly affected" by the laws of another, and may therefore challenge the laws of another, just as North Dakota and Montana are seeking to do here.[13] Issues of enforcement (i.e., which entities would be subject to penalty under Washington Law) "do not bear on whether the applicant is within the scope of those persons entitled to use the administrative procedure set forth in § 5125(d) for obtaining a preemption determination."[14]

B. North Dakota and Montana will Suffer Several Direct Effects Due to Washington's Law.

As previously described, North Dakota and Montana will suffer specific reductions in oil and gas severance tax revenue[15] and reductions in royalties received from producers, as the landowner. In addition, both states will confront real and decidedly non-speculative safety, environmental, and economic effects associated with pre-treating Bakken crude or identifying alternative modes and routes to comply with the Washington Law.

1. Diminished Oil & Gas Severance Tax Revenue and Royalties.

Washington State maintains that "tax revenue is a classic *indirect* impact" and therefore cannot support standing in this challenge.[16] Washington does not cite to any case law to support

[12] 49 U.S.C. § 5125(d)(1).

[13] Washington State also makes much of North Dakota and Montana's use of the phrases "directly affected" and "adversely affected," Washington AG Comments at 9, but this emphasis on semantics has already been dismissed by PHMSA's predecessor. PD-12(R), *New York Department of Environmental Conservation; Requirements on the Transfer and Storage of Hazardous Wastes Incidental to Transportation*, 60 Fed. Reg. 62,527, 62,532 (Dec. 6, 1995). As RSPA has explained, the plain words of the statute do not require showing that one is "adversely affected," "aggrieved," or has suffered "injury" or "actual harm." *Id*.

[14] *Id.*

[15] In North Dakota, produced oil is taxed at 10% of the value as it leaves the well site. The gross production tax rate on oil is 5% of the gross value and the oil extraction tax rate is 5% of the gross value. *See* North Dakota Office of State Tax Commissioner, Oil and Gas Tax FAQs, https://www.nd.gov/tax/faqs/articles/160-/, last visited October 22, 2019. The revenue from these taxes is collectively referenced in these comments as the "oil and gas severance tax revenue."

[16] Washington AG Comments at 10.

this claim. Nor could it. Washington is confusing general taxpayer standing to sue in court with a State's ability to sue for loss of oil and gas severance tax revenues. In fact, the Supreme Court has settled the latter issue: a State can establish standing by pointing to the "loss of specific tax revenues."[17] In *Wyoming v. Oklahoma*, the Court considered Wyoming's challenge to an Oklahoma law requiring coal-fired utility plants to use a certain percentage of Oklahoma coal. Wyoming sought to challenge the law because it stood to lose tax revenue tied to the in-state extraction of coal. The Court held that Wyoming had standing to sue based on the loss of specific severance tax revenue assessed on those who extracted Wyoming coal.

North Dakota imposes an oil and gas severance tax analogous to the tax discussed in *Wyoming v. Oklahoma*. The state relies upon the resulting tax revenue to support its education system, its drinking water infrastructure development, and more. The link between North Dakota's tax revenue loss and the Washington law is not tenuous; it is direct. The law will diminish the value of the approximate 10 percent of Bakken crude that is shipped from North Dakota via rail to Washington State.[18] North Dakota taxes produced oil at ten percent of its value as it leaves the well site. If the oil itself is devalued as a result of pretreatment and removal of butane,[19] North Dakota's tax revenues tied to the oil's value will decrease as well.[20] Even if the same amount of oil is ultimately extracted and sold to East coast refineries rather than Washington State refineries, North Dakota will lose specific tax revenue because these alternative markets yield materially lower per-barrel rates. For example, based on the market rates for Bakken crude oil in July 2019, North Dakota estimates it will lose an average of approximately $32,000 per day from July 1, 2019 – June 30, 2020 (i.e., through the end of the current fiscal year) and an average of approximately $36,000 per day thereafter through July 1, 2031, in lost oil and gas severance tax revenue as a result of the Washington Law. Commenters who suggest that there would be no revenue loss if crude oil is shipped to another destination do not understand the economics of the global petroleum market and fail to account for the effects

[17] *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) (holding that Wyoming had standing to sue Oklahoma due to the effect that legislation requiring that Oklahoma coal-fired power plants burn a mixture of coal containing at least 10% Oklahoma-mined coal had on Wyoming's coal severance tax revenue).

[18] Washington State receives roughly 10% of North Dakota's oil production. If other states follow Washington's lead, however, and set their own standards for Bakken crude oil, North Dakota's market could theoretically shrink even further.

[19] *See* Preemption Petition at 12 (explaining why removing butane and other light-end components through pretreatment, or imposing additional transportation costs, will reduce the value of crude oil produced from the Bakken).

[20] *Id.*

of supply and demand and transaction costs on the value of crude oil in any given market.[21] While there may be alternative markets for Bakken crude, they are not interchangeable. Just as in *Wyoming v. Oklahoma*, North Dakota has firmly established standing to challenge Washington's law due to a loss in its severance tax revenue.

On top of that, North Dakota and Montana are both "land grant" states, meaning the state *itself* is the landowner for several oil and gas leases throughout the Bakken region. As the landowners, North Dakota and Montana receive direct royalties from oil and gas extraction operations occurring on state-owned leases. The amount of in royalties to which the landowner, *i.e.*, North Dakota or Montana, is entitled is also tied to the value of the oil at the time of extraction.[22] The Washington State law will adversely affect the yield from these royalties which will, in turn, directly affect North Dakota and Montana's royalty revenue.

2. Environmental and Safety Effects.

North Dakota and Montana have also articulated several other ways in which they are "directly affected" by the Washington State law. If North Dakota and Montana producers seek to comply with Washington's law by means of constructing pretreatment facilities (i.e., "topping facilities") and related infrastructure, or by re-routing shipments, they will confront environmental impacts (in addition to the obvious economic impacts) associated with that construction and transportation. As explained in the comments filed by the American Fuel & Petrochemical Manufacturers (AFPM), there are no existing topping refineries that are close to the Bakken reserves that could carry out the pretreatment needed to meet the Washington State vapor pressure threshold.[23] This means North Dakota and Montana are facing not just the economic consequences associated with construction of this infrastructure, including the roads necessary to access this infrastructure, but also the environmental and safety consequences associated with two separate movements of hazardous materials (to and from the topping

[21] *See* Earthjustice et al., Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements at 6 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4112&attachmentNumber=1&contentType=pdf (hereafter, "Earthjustice Comments").

[22] *See e.g.* North Dakota Oil and Gas Lease Form 32819, Section 4 "Royalties," https://www.land.nd.gov/sites/www/files/documents/Minerals/OGLeaseForm32819.pdf, (explaining the royalty on oil is based upon "gross production or the market value thereof"…determined by the highest posted price paid for the oil, the highest market price, or the gross proceeds of sale, whichever is greater).

[23] AFPM, Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements at 6 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4114&attachmentNumber=1&contentType=pdf (hereafter, "AFPM Comments").

refineries) and with removing the light-ends from the crude oil and then transporting these materials as two separate commodities.[24]

3. The Washington Law is Already Causing Direct Effects.

Washington State argues that its vapor pressure limit has no immediate regulatory effect on the transportation of crude oil because it applies to existing refineries only after the volume of crude oil shipped to the facility has increased by more than 10% compared to 2018 volumes.[25] This is irrelevant to determining whether the issue is currently ripe for review by PHMSA. The law is in effect now and several Washington refineries filed comments explaining how they have already been harmed by this law or modified operations to ensure compliance with the Washington Law.[26] While it may be too soon for North Dakota and Montana to estimate the exact loss in oil and gas severance tax revenue or the precise extent of environmental, safety, and economic impacts, the impacts themselves are far from speculative and underscore that the time is now for PHMSA's preemption determination.

C. PHMSA Need Not Distinguish Between the Vapor Pressure Provisions and the Advance Notice Provisions to Determine Standing.

North Dakota and Montana do not challenge Washington State's advance notice requirements in a vacuum. Rather, the requirement to include the vapor pressure information is

[24] Preemption Petition at 11.

[25] Washington AG Comments at 6 and 9.

[26] *See e.g.* Phillips 66, Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements, at 3-4 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4120&attachmentNumber=1&contentType=pdf (hereafter, "P66 Comments") (explaining that Phillips 66's Ferndale, Washington refinery "has drastically reduced the scheduled deliveries of crude oil to be unloaded at the Ferndale Refinery" to ensure that the 2018 rail rack unloaded volume is not exceeded by 10% and thus triggering the vapor pressure limit); BP, Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4115&attachmentNumber=1&contentType=pdf (hereafter, "BP Comments") (explaining the resulting harm to the Cherry Point, Washington refinery); Marathon Petroleum, Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements, at 2 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4116&attachmentNumber=1&contentType=pdf (hereinafter, "Marathon Comments") (explaining the resulting harm to the Anacortes, Washington refinery).

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directly tied to the requirement to meet the 9 pounds per square inch (psi) vapor pressure limit. The advance notice requirement enables the state to enforce its vapor pressure limit and must be examined in context with the limit itself. Determining the viability of the Preemption Petition by artificially segmenting the advance notice requirement from the vapor pressure limit to examine North Dakota and Montana's standing would hamstring PHMSA's ability to examine the full implications of the Washington law and the obstacles it presents to carrying out the HMTA. PHMSA cannot protect the uniformity of the national hazmat regulations by letting the tail wag the dog.

III. THE HMTA DOES NOT LIMIT PHMSA'S PREEMPTION CONSIDERATION TO THE INFORMATION PRESENTED IN THE ORIGINAL PETITION.

In its comments, Washington State contends that North Dakota and Montana have failed to provide sufficient evidence to support the Preemption Petition. The purpose of the petition is not to bombard PHMSA with evidence—especially given the quintessentially legal nature of this preemption petition. It is to present the case for preemption. In evaluating that petition, PHMSA is not limited to the facts and arguments presented in the initial preemption petition. It has broad authority to "initiate an investigation of any statement in an application and utilize in [its] evaluation any relevant facts obtained by that investigation."[27] PHMSA may solicit third party submissions, convene a hearing, request expert opinions, follow up with interested parties, and "consider any other source of information."[28] Accordingly, PHMSA is not limited to the initial Preemption Petition as the scope of the administrative record. The preemption determination is made upon "consideration of the application *and* other relevant information received" in the course of the notice, comment, and rebuttal process.[29]

To that end, North Dakota and Montana have not attempted to present every fact relevant to PHMSA's preemption review or to develop a "cost study" to support the assertion that pretreatment is prohibitively expensive. Nor are they required to. North Dakota and Montana cannot provide *evidence* of the anticipated increase in miles traveled for Bakken crude oil to new pretreatment facilities because these facilities do not exist yet. They cannot provide *evidence* of its decreased royalties and tax revenues because that data does not exist yet. They can, and have, offered the informed views of both States' Attorney Generals about the significant anticipated impacts on both States from Washington's arbitrary law. In addition to the information included by North Dakota and Montana in the Preemption Petition, moreover, AFPM and its member companies, which includes the five refineries located in Washington State, have elaborated on

[27] 49 C.F.R. § 107.207(a).

[28] *Id.*

[29] *Id.* at § 107.209(a).

the inadequacies of existing conditioning infrastructure to accomplish pretreatment to 9 psi[30] and the anticipated modal shift and unnecessary delay that would likely ensue if Bakken crude is shipped via alternative means such as barge or truck.[31] It is these impacts – increased mileage, increased transit time, and increased delay – which PHMSA has consistently held present an obstacle to the primary purpose of the HMTA.[32]

And PHMSA need not consider only the concerns of North Dakota and Montana. The Attorneys General of eleven states filed joint comments in support of the Preemption Petition articulating the same concern that the Washington Law imposes requirements that are not "substantively the same" as the HMR and presents and obstacle to compliance with the HMTA.[33] Likewise, 32 members of Congress also wrote in strong support of federal preemption, characterizing the Washington Law as a provision that "directly undermines [the United States Department of Transportation's (DOT)] authority to promulgate and enforce regulations" governing the safe and uniform transportation of goods in commerce.[34] Despite Washington's effort to invoke its police power to protect its citizens from the risk of derailments, *no* other states have filed comments in support of the Washington Law or otherwise endorsed piecemeal, state-by-state regulation of hazardous materials transportation. That absence speaks volumes.

[30] AFPM Comments at 6 (describing the pretreatment process and the need for additional "topping refinery" infrastructure).

[31] *Id.* at 7 (estimating the increase in rail miles if Bakken crude is re-routed to the Gulf Coast).

[32] *See e.g.*, PD No. 4(R), *Nalco Chemical Company*, 58 Fed. Reg. 48,933 (Sept. 20, 1993) ("Since safety risks are inherent in the transportation of hazardous materials in commerce, … an important aspect of transportation safety is that transit time be minimized") (internal citations omitted); PD-22(R), *New Mexico Requirements for the Transportation of Liquefied Petroleum Gas*, 67 Fed. Reg. 59,396, 59,396, 59,399 (Sept. 20, 2002) (collecting decisions where PHMSA or RSPA determined that unnecessary delay creates an obstacle to carrying out the HMR's prohibition against unnecessary delays hazmat transportation).

[33] Office of the Attorney General for the State of Oklahoma, Comments on Petition for Preemption of Washington State's Crude Oil Volatility Law, Docket No. PHMSA-2019-0149; PDA-40(R) (filed on behalf of Oklahoma, Arkansas, Indiana, Louisiana, Nebraska, Ohio, South Dakota, Utah, West Virginia, and Wyoming).

[34] Letter from Members of Congress to DOT Secretary Elaine Chao and PHMSA Administrator Howard "Skip" Elliott (August 5, 2019).

IV. THE WASHINGTON LAW IS AN OBSTACLE TO CARRYING OUT THE PURPOSE OF THE HMTA AND DOES NOT ENHANCE SAFETY OR FILL A REGULATORY GAP.

Washington and other commenters who oppose preemption assert that the purpose of the Washington Law is to improve safety in the event of a derailment and to fill a gap in the federal regulations governing the transportation of crude oil by rail. However, the comprehensive "Sandia Study" discussed below makes clear that the science does not support the presumption that a vapor pressure limit will mitigate the impacts of a derailment. Moreover, the absence of a federal vapor pressure limit is not a regulatory gap – it is a deliberate decision by the federal government to avoid prematurely regulating crude-by-rail. Finally, the commenters who oppose preemption, including Washington State, fail to refute the fact that the Washington Law is an obstacle to carrying out the purpose of the HMTA because it will cause increased times in transit, increased incident of risk, and unwarranted delay.

A. The Joint DOE/DOT Sandia Study Report Underscores the Conclusion that Washington's Law is Preempted and Does not Enhance Safety.

When Congress passed the Fixing America's Surface Transportation (FAST) Act in 2015, it recognized the significance of a then-ongoing study by Sandia National Laboratory and others entitled the "Crude Oil Characteristics Research Sampling, Analysis and Experiment Plan" (referenced hereafter as the "Sandia Study"). The purpose of this study was to "characterize tight and conventional crudes based on key chemical and physical properties, and identify properties that may contribute to increased likelihood and/or severity of combustion events that could arise during handling and transport" in order to improve the understanding of "transport-critical crude oil" and it properties.[35] The FAST Act requirements validate the role of the Sandia Study in developing and improving national regulations for the safe transportation of crude-by-rail. Specifically, Section 7309 of the FAST Act requires that the United States Department of Energy (DOE) and DOT submit a report to Congress within 180 days of the Sandia Study's completion that includes, among other things, the results of the study and any "recommendations, based on the findings of the study, for [1] regulations by the Secretary of Transportation or the Secretary of Energy to improve the safe transport of crude oil and [2] legislation to improve the safe transport of crude oil."[36] This mandate is a clear indicator of

[35] See Dep't of Energy, Crude Oil Characteristics Research Sampling, Analysis and Experiment (SAE) Plan 1 (2015), https://www.energy.gov/sites/prod/files/2016/06/f32/Crude%20Oil%20Characteristics%20Research%20SAE%20Plan.pdf.

[36] FAST Act, Pub. L. 114-94, § 7309, 129 Stat. 1312, 1600-01 (2015).

PHMSA's jurisdictional primacy as well as Congress's desire to ensure that the regulation of crude-by-rail is grounded in science.[37]

Sandia published the findings of the Sandia Study on August 23, 2019, shortly after North Dakota and Montana filed the Preemption Petition. The Sandia Study is important for two reasons. First, it represents the research of two federal agencies, DOT and DOE, demonstrating in very practical terms that a vapor pressure limit is the province of a national inquiry and should be left to a national agency. Second, the Sandia Study debunks Washington State's purported justification for enacting its crude-by-rail vapor pressure limit. Washington State claims that the purpose of imposing a vapor pressure limit is to "improve public safety" in the event of a derailment involving crude oil because it would reduce ignition potential.[38] However, the science does not support the assumption that regulating vapor pressure will mitigate the consequences of a derailment. Commenters who oppose preemption rely heavily on findings from the U.S. DOT "Operation Safe Delivery" program and study.[39] These findings were published in 2014 as part of a DOT enforcement effort rather than a comprehensive research study. DOT has since undertaken an extensive study of crude oil characteristics which culminated in the recent publication of the Sandia Study.

In its report entitled "Pool Fire and Fireball Experiments in Support of the US DOT/DOT/TC Crude Oil Characterization Research Study," Sandia reviewed the physical, chemical, and combustion characteristics of select North American crude oils, including Bakken crude, and "how these associate with thermal hazard distances resulting from pool fires and

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[37] Washington State repeatedly points to North Dakota's vapor-pressure law as justification for its own. But the difference is instructive, and in fact supports North Dakota's and Montana's preemption position. North Dakota requires all oil producers in the state to ensure that all Bakken crude oil meets the *national standard for stable crude* of 14.7 psi, as defined in the latest version of ANSI/API RP3000. *See* NDIC Order No. 25417, as amended by NDIC Order No. 29398 (Jan 18, 2019). North Dakota thus imposes a vapor pressure limit of 13.7 psi to account for the accepted one-psi margin of error in the sampling procedures and measurement equipment. *See* North Dakota Industrial Commission, Minutes of a Meeting of the Industrial Commission of North Dakota at 3 (Dec. 9, 2014), http://www.nd.gov/ndic/minutes/ic141209.pdf ("The Order still requires one psi below what [API] and ANSI define as stable crude oil" because in the "extensive body of work that Sandia Laboratories did on the Strategic Petroleum Reserve," Sandia estimates a "one psi reproducibility error…. We want people to know that we have gone one psi below the standards so crude oil in North Dakota will…meet the stable crude oil standard."). North Dakota has thus codified a national, standard, accepted industry practice. Washington has not.

[38] Washington AG Comments a 1, 3.

[39] *See e.g.*, Earthjustice Comments at 3.

fireballs."[40] Among other things, the report concluded that "vapor pressure is not a statistically significant factor in affecting" pool fire and fireball burn characteristics.[41] This is because ignition potential depends on a variety of factors and "cannot be identified by a single index" such as vapor pressure.[42] Accordingly, "the results [of this study] do not support creating a distinction for crude oils based on vapor pressure with regards to these combustion events."[43]

B. The Absence of a Federal Vapor Pressure Limit Is Deliberate and is Not a Regulatory Gap.

The Sandia Study also invalidates the notion that the Washington Law fills a "regulatory gap" due to the lack of action by the federal government.[44] As detailed in the Preemption Petition, PHMSA and the Federal Railroad Administration deliberately chose not to include a vapor pressure requirement when they undertook a comprehensive review of the hazmat regulations applicable to crude-by-rail during the HM-251 rulemaking because the DOT/DOE review of "best practices for testing and classifying crude oil" was still ongoing.[45] When PHMSA subsequently considered the issue of crude oil volatility in January 2017, it published an Advanced Notice of Proposed Rulemaking (ANPRM) in response to a petition for rulemaking filed by the New York State Office of the Attorney General. Again PHMSA declined to impose a vapor pressure requirement in the absence of a scientifically-based indication such a requirement would enhance safety. At that time, the Sandia Study was still on-going and PHMSA explained it would not make a decision about a crude oil vapor pressure limit until it had fully assessed the results of Sandia Study, in accordance with federal law.[46] Contrary to

[40] Luketa, Anay, Blanchat, Thomas K., Lord, David, Hogge, Joseph, Cruz-Cabrera, Alvaro Augusto, and Allen, Ray, "Pool Fire and Fireball Experiments in Support of the US DOE/DOT/TC Crude Oil Characterization Research Study." United States. doi:10.2172/1557808. https://www.osti.gov/servlets/purl/1557808 (hereafter, "Sandia Study").

[41] Sandia Study at 3.

[42] Sandia Study at 75.

[43] *Id.*

[44] Washington AG Comments at 4.

[45] Preemption Petition at 23-24.

[46] *See* Letter from Acting Deputy Administrator of PHMSA Howard W. McMillan to Representative Kevin Cramer (May 16, 2017). http://www.dgac.org/sites/fudgac.cms.memberfuse.com/dgac/files/PHMSA_Response_to_Congressional_Letter-2.pdf ("PHMSA does not plan to issue a notice of proposed rulemaking or final rule [regarding the ANPRM titled "Volatility of Unrefined Petroleum Product and Class 3 Material"] prior to completion of the study being conducted by the Sandia National Laboratories (Sandia). In accordance with Section 7309 of the Fixing America's Surface Transportation Act

Washington's assertion, PHMSA's inaction is not a regulatory void; it is the outgrowth of a thorough and deliberate approach designed to ensure the agency's ultimate decision about a vapor pressure limit is informed by and grounded in science.

C. The Washington Law Fails the Obstacle Test Because the Three Avenues of Compliance Increase the Incident of Risk in Transportation and/or Cause Unwarranted Delay and Increased Transit Times.

As explained in the Preemption Petition, each of the three methods of compliance with Washington's Law creates obstacles to carrying out the stated purpose of the HMTA. These methods are: (1) pretreatment, (2) alternate modes of transportation, or (3) redirecting the crude oil to facilities outside of Washington State.[47]

Contrary to Washington's erroneous assertion,[48] multiple commenters have reinforced North Dakota and Montana's arguments that pretreatment is cost prohibitive and that the existing conditioning infrastructure in North Dakota is insufficient to achieve 9 psi for all Bakken crude.[49] For example, Equinor Marketing & Trading (US) Inc., a company that transports Bakken crude oil by rail to refineries in Washington State, explained that pretreating the 150,000 barrels of crude oil transported to Washington State each day with vapor recovery units "would

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of 2015, PHMSA plans to assess the results of Sandia's comprehensive Crude Oil Characteristics Research Sampling, Analysis, and Experiment Plan study in order to make a determination in the need to propose new regulations.").

[47] Preemption Petition at 13-16.

[48] Washington AG Comments at 14.

[49] *See e.g.*, Equinor, Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements, at 5-6 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4107&attachmentNumber=1&contentType=pdf (hereafter, "Equinor Comments") ("Unconditioned crude oil would need be transported by truck to vapor recovery units or enhanced refining centers (i.e., topping refineries or mini-refineries). The crude oil would need to be unloaded for refining and reloaded after it goes through the refining process before it can be transported to Washington State. The currently available technology does not permit suppliers to achieve the 9 psi vapor pressure requirement without such an intermediary refining process. This intermediary refining process requires additional transportation and loading and unloading, which creates additional safety risks. In addition, the infrastructure required for the intermediary refining process is well beyond what currently exists in North Dakota and would need to be constructed to accommodate the volume of crude production stemming from the Bakken Shale region."); AFPM Comments at 6-7 ("There are no topping refineries that are close to the Bakken reserves.").

cost approximately $300 million in capital alone."[50] The American Petroleum Institute (API) also explained that "currently available wellsite equipment [in the Bakken] cannot be used to consistently reduce the vapor pressure of Bakken crude to meet Washington's 9 psi limit and would require the construction of new "small scale refineries" and corresponding new gathering systems to achieve the 9 psi limit.[51] Even if it were economically feasible, which it is not, pretreatment increases the inherent incident of risk in transportation because it requires additional movements of hazardous materials to and from the mini-refineries.[52] Not only is this contrary to the purported purpose of the Washington Law in reducing the transport of volatile petroleum products by rail, but also it is an obstacle to the HMTA.

Washington also argues that North Dakota and Montana have failed to provide evidence of the anticipated increase in miles traveled due to pretreatment, re-routing, or modal shift.[53] As noted above, it is impossible to provide *evidence* of the increase in miles traveled to pretreatment facilities because these facilities do not exist. However, the following facts are indisputable: (1) if light-ends are separated from crude oil during pretreatment, both the treated crude oil and the light-ends will be transported separately;[54] and, (2) it takes more highway cargo tanks to transport the same amount of crude oil as one railcar.[55] Accordingly, pre-treatment and modal shift will automatically increase the total miles traveled for hazardous materials. Other commenters have also estimated the additional miles traveled if Bakken crude oil were re-routed

[50] Equinor Comments at 6.

[51] American Petroleum Institute, Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements, at 5-7 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4111&attachmentNumber=1&contentType=pdf (hereafter "API Comments").

[52] *See also* AFPM Comments at 6 (explaining the increased movement of hazardous materials caused by pretreatment); API Comments at 7 (same).

[53] Washington AG Comments at 14, 16-17.

[54] *See also* AFPM Comments at 6; API Comments at 7.

[55] *See also* Railway Supply Institute, Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements, at 4 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4078&attachmentNumber=1&contentType=pdf (hereafter "RSI Comments") ("for every one tank car, a shipper would need to use three highway cargo tanks to transport the same amount of product, and those shipments would occur on an already stressed highway system used by the general public"); API Comments at 7 (examining the number of trucks required to transport 166,700 barrels per day by truck from North Dakota to Washington).

from North Dakota to alternative markets in the East or the Gulf Coast.[56] The administrative record contains ample evidence of the anticipated increased transit time and distance traveled attributable to the Washington Law. Because these results cause unwarranted delay and increase the incident of risk inherent in the transport of hazardous materials, the Washington Law is an obstacle to accomplishing the purposes of the HMTA.

V. WASHINGTON'S LAW RECLASSIFIES CRUDE OIL AND IMPOSES HANDLING REQUIREMENTS THAT ARE NOT SUBSTANTIVELY THE SAME AS FEDERAL REQUIREMENTS.

The Washington Law is not substantively the same as the HMR with respect to crude oil classification or handling: under federal law crude oil with a vapor pressure above 9 psi may be lawfully transported by rail and loaded or unloaded throughout the U.S. while under Washington law it is prohibited. This leaves little doubt that these two regulatory regimes are not "substantively the same" because the Washington Law does not conform "in every significant respect to the federal requirement.[57]

Washington attempts to argue its classification system is the same as the HMR because crude oil is still a "Class 3 Flammable Liquid," as it is classified in the HMR. However, as explained in the Preemption Petition, the Washington Law deviates from the federal classification scheme by effectively reclassifying as "forbidden" crude oil with a vapor pressure that exceeds 9 psi.[58] The HMRs do not classify petroleum crude oil according to vapor pressure and crude oil is not a designated "forbidden" material under the HRM. The Washington law creates two classes of crude oil, one with vapor pressure below 9 psi and one with vapor pressure above 9 psi and prohibits shipment by rail for loading or unloading at any new facility within

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[56] American Association of Railroads et al., Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements, at 21 n.61 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4110&attachmentNumber=1&contentType=pdf (hereafter, "AAR Comments") ("The Epping, North Dakota to Tacoma, Washington crude-by-rail route is 1,334 miles whereas the Epping, North Dakota to Linden, New Jersey crude-by-rail route is 1,922 miles and the Epping, North Dakota to Raceland, Louisiana crude-by-rail route is 2,154 miles."); *see also* Hess Corporation, Comments on Hazardous Materials: The State of Washington Crude Oil by Rail-Vapor Pressure Requirements, at 10 (Sept. 23, 2019), https://www.regulations.gov/contentStreamer?documentId=PHMSA-2019-0149-4119&attachmentNumber=1&contentType=pdf (identifying an additional 600 miles traveled to deliver crude oil from the Bakken to St. James, Louisiana, which in turn increases the cost of transportation by $4-5/barrel).

[57] 40 C.F.R. § 107.202(d).

[58] Preemption Petition at 19-20.

Washington and any existing facility within Washington that exceeds 2018 volumes by 10%. When a State or local classification scheme is materially different from that of the HMR it is preempted.[59]

Commenters opposing preemption also assert that the Washington Law only regulates unloading of crude oil, as opposed to handling of crude oil, and therefore is beyond the scope of the HMR.[60] Washington State does not introduce this argument until page 20 of its 24-page comments.[61] And for good reason. First, Washington and others ignore that the vapor pressure limit is applicable to both *loading* and unloading.[62] PHMSA's predecessor made clear in the HM-223 rulemaking that "loading is regulated under the HMR" regardless of whether it is a pre-transportation or transportation function.[63]

Second, "unloading incident to movement" is also squarely within the activities regulated by the HMR.[64] The federal regulations make clear that "…emptying a hazardous material from the bulk packaging after the hazardous material has been delivered to the consignee when performed by carrier personnel or in the presence of carrier personnel" is activity regulated under the HMR.[65] The Washington Law is applicable regardless of whether a carrier is present and therefore regulates activities that include unloading incident to movement, an activity regulated under the HMR.

Finally, Washington's reliance on HM-223 as justification for its assertion that the Washington Law only regulates activity that lies outside the HMTA's preemptive domain is

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[59] See PD-30, *Houston, TX Requirements on Storage of Hazardous Materials During Transportation*, 71 Fed. Reg. 9,413, 9,418 (Feb. 23, 2006) (preempting the Houston Fire Code's hazardous materials classification requirements because they were not "substantively the same" as federal requirement in that the Houston requirements (1) used definitions for "flammable" and "combustible" that differed from the HMR definitions, (2) classified some materials as "combustible" in the Fire Code when they were "flammable" in the HMR; and (3) regulated certain liquids based on flash point as "combustible" under the Fire Code that were not regulated under the HMR).

[60] Washington AG Comments at 20; Earthjustice Comments at 11.

[61] Washington AG comments at 20.

[62] S. 5579, 66th Leg., 2019 Reg. Sess. § 1 (Wash. 2019) (codified at Wash. Rev. Code § 90.56).

[63] RSPA, *Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage*, 68 Fed. Reg. 61,909, 61,909, 61,916 (Oct. 30, 2003) (hereafter, "HM-223 Final Rule").

[64] HM-233 Final Rule, 68 Fed. Reg. 61,907.

[65] 49 C.F.R. § 171.8 (unloading incidental to movement).

misplaced.[66] The regulatory exclusion for unloading that occurs after a rail carrier has delivered a product and left the shipper's facility was intended to permit individual states to regulate post-delivery actions that were part of a manufacturing operation, not transportation operations.[67] PHMSA's predecessor sought to delineate the regulation of "functions that affect the safe transportation of hazardous materials in commerce" (i.e., those subject to HMTA preemption) from the regulation of post-delivery activities at a fixed facility that are properly "considered part of the manufacturing process."[68] Although the Washington Law purports to address "unloading," it does not actually regulate post-delivery conduct, because there is nothing that can be done post-delivery to ensure compliance with the vapor pressure requirement. Washington conceded as much when it explained that the Washington Law is "intended to prevent the ignition of fires on trains bringing in volatile oil into the state of Washington."[69]

Facility personnel at a Washington refinery cannot comply with the Washington Law by carrying out activities within the bounds of the facility that are "part of the manufacturing process." The only way to comply with the Washington Law and ensure the crude oil does not exceed the vapor pressure limit is to pre-treat the crude oil or restrict the type of crude oil transported by rail into Washington State.[70] The Washington Law thus does not change or regulate the behavior or conduct of facility personnel in Washington responsible for unloading. It forces entities to undertake actions that impact transportation well prior to unloading (e.g., pretreatment).

Washington State and other commenters in opposition also assert that PD 8(R) – 11(R) is controlling.[71] They overstate the relevance of this determination. It pre-dates HM-223 and upheld state and local obligations that are not analogous to the Washington Law. In PD 8(R) – 11(R), RSPA examined state and local regulations that required hazardous materials handlers to register with local authorities and prepare and submit risk management and storage-related

[66] Washington AG Comments at 21.

[67] HM-223 Final Rule at 61,917, 61,931 ("we continue to believe that the unloading of a rail tank car directly into a manufacturing process is more properly considered part of a manufacturing operation, not a transportation operation.")

[68] *Id* at 61,915, 61,916.

[69] Washington AG Comments at 3 n.11.

[70] Even if a Washington refinery itself were to treat the crude oil to reduce the vapor pressure, the facility must first unload the crude oil and therefore would still run afoul of the Washington Law.

[71] Washington AG Comments at 21; Earthjustice Comments at 12.

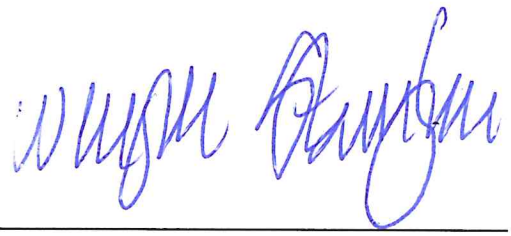
inventory and emergency preparedness plans.[72] Unlike the Washington Law, compliance with the regulations at issue in PD 8(R) – 11(R) could be accomplished by revising the facility storage methods, registration procedures, and emergency response/spill prevention planning[73]—localized actions designed to address safety at the unloading facility that are distinct from transportation functions.

For these reasons, the Washington Law regulates a transportation function and is easily within the scope of the HMTA. With respect to both classification and handling, the Washington Law is not substantively the same as the HMR for these two covered subjects.

VI. CONCLUSION

For the reasons stated herein, and those in the Petition, the State of North Dakota, through its Attorney General, and the State of Montana, through its Attorney General, respectfully request that PHMSA issue a determination that Washington State Engrossed Substitute Senate Bill 5579, "Crude Oil by Rail – Vapor Pressure" is preempted. Should you have additional questions concerning this Application, please contact the undersigned at (701) 328-2210 or ndag@nd.gov for the North Dakota Attorney General or (406) 444-2026 or contactdoj@mt.gov for the Montana Attorney General.

Respectfully submitted,



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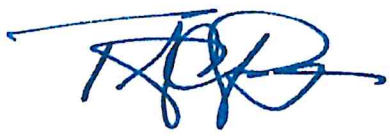

Tim Fox
Attorney General
State of Montana

[72] PD 8(R) – 11(R), *California and Los Angeles County Requirements Applicable to the On-site Handling and Transportation of Hazardous Materials*, 60 Fed. Reg. 8774 (Feb. 15, 1995).

[73] *Id.* at 8783, 8787.